Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-507

FAIRFAX COUNTY WIDE CITIZENS ASSOCIATION, et al.,

Petitioners,

v.

COUNTY OF FAIRFAX, VIRGINIA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. The right to relief from this Court has been waived	3
II. The alleged conflict among the courts of appeal created by this decision is more apparent than real	3
III. The decision of the court appeals did not deviate from the normal so as to warrant the exercise of this Court's power of supervision	7
IV. The issue on the merits is moot	8
CONCLUSION	9
APPENDIX A	A-1
APPENDIX B	A-4
APPENDIX C	A-5

CITATIONS

Cases

	Page
All States Investors, Inc. v. *Bankers Bond Co.*, 343 F.2d 618 (6th Cir. 1965), *cert. denied*, 383 U.S. 834 (1965)	6
Aro Corp. v. *Allied Witan Co.*, 531 F.2d 1368 (6th Cir. 1976), *cert. denied*, 429 U.S. 862 (1976)	5, 6
Autera v. *Robinson*, 419 F.2d 1197 (D.C. Cir. 1969)	6
Beirne v. *Fitch Sanitarium*, 167 F.Supp 692 (S.D.N.Y. 1958)	7
Cia Anon Venezolana De Navigacion v. *Harris*, 374 F.2d 33 (5th Cir. 1967)	6
Chief Freight Lines Co. v. *Local Union No. 886*, 514 F.2d 572 (10th Cir. 1975)	5
Coburn v. *Cedar Valley Land Co.*, 138 U.S. 196 (1891)	6
Cummins Diesel Michigan, Ins. v. *The Falcon*, 305 F.2d 721 (7th Cir. 1975)	7
Fairfax Countywide Citizens Association, et al v. *County of Fairfax, Virginia, et al.*, 571 F.2d 1299 (4th Cir. 1978)	4, 5, 6
Ingalls Iron Works Co. v. *Ingalls*, 177 F.Supp 157 (N.D. Ala. 1959)	7
Kelly v. *Greer*, 334 F.2d 434 (3d Cir. 1964)	4
Kelly v. *Greer*, 365 F.2d 669 (3d Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967)	4, 5
Kukla v. *National Distillers Products Co.*, 483 F.2d 619 (6th Cir. 1973)	6
Massachusetts Casualty Ins. Co. v. *Forman*, 469 F.2d 259 (5th Cir. 1977)	7
Meetings and Expositions, Inc. v. *Tandy*, 490 F.2d 714 (2d Cir. 1974)	7
Skyline Sash Co. v. *Fidelity and Casualty Co. of New York*, 379 F.2d 369 (3d Cir. 1967), *aff'g* 267 F.Supp. 577 (W.D. Pa. 1966)	5
Turner v. *President, Directors and Company of the Bank of North America*, 4 Dall. 8 (1799)	7

Statutes, Rules

28 U.S.C. § 1331	5
Title 29 U.S. Code	5
§ 15.1-26.2, Code of Virginia (1950), as amended	8
§ 33.1-225.3, Code of Virginia (1950), as amended	8
Federal Rules of Civil Procedure, Rule 60(b)	5, 7
Rules of the Supreme Court of the United States 19(1)(b)	7

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent Douglas B. Fugate, individually and as State Highway Commissioner, by counsel, respectfully requests that the Court deny the Petition for a Writ of Certiorari seeking review of the Opinion in this matter of the Court of Appeals for the Fourth Circuit.

QUESTION PRESENTED

Whether, after the entry of a dismissal order not incorporating a settlement agreement which settled a cause of action as to which federal jurisdiction existed, there must be an independent federal jurisdictional base to enforce said agreement.

STATEMENT OF THE CASE

Respondent Fugate supplements the Statement of the Case presented by Petitioners, hereinafter "Association". Respondent Fugate believes that he is no longer a party litigant in this matter. That belief is buttressed by statements in Petitioners' Petition at p. 4 describing the proceedings below. That belief is shaken, however, by the fact that the Association served their Petition for a Writ of Certiorari upon Respondent Fugate.

To advise the Court of the posture that Respondent Fugate believes himself to be in, he submits the following remarks. The district court's memorandum opinion (Petitioner's Petition, Appendix D, pp. 18a to 23a) speaks only as to the County Respondents. The order of November 26, 1976 which followed this opinion expressly reopened the litigation only as to the County Respondents and compelled performance of the agreement they entered into. *See* Appendix A to this Brief in Opposition.

The County Respondents appealed the district court's order and the Petitioners cross-appealed the district court's order because it failed to provide certain affirmative relief requested by Petitioners and the dismissal of defendant Fugate from the proceedings.

The court of appeals of the fourth circuit reversed the district court's decision where it compelled performance of the settlement agreement entered into between the Association and the County Respondents holding that the district court had no jurisdiction to enforce the agreement. The Court of Appeals agreed that the trial of the original claim at the district court level could be reopened. *See* Petitioners' Petition, Appendix A, p. 14a.

After a reconsideration request filed by Petitioners was denied by the Court of Appeals, the Association then chose

to go to trial solely against the County Respondents on the merits of their original claim. The outcome of that trial, conducted July 10, 1978, is still pending. *See* Respondent County's Brief in Opposition, p. 3.

Accordingly, it is Respondent Fugate's belief that there exists no appeal as to him, and that he is no longer a party litigant either in this Court or in the district court.

REASONS FOR DENYING THE WRIT

I

The Right To Relief From This Court Has Been Waived

If the Writ of Certiorari is granted by the Court, such grant should be limited to the issue between the Association and the County Respondents. The posture of Respondent Fugate is set out in the Statement of the Case herein and will not be restated.

It is submitted that upon the entry of the opinion and order of the court of appeals for the fourth circuit, the Association was left with two mutually exclusive alternatives. It could either go to trial under the original claim or appeal to this Court. The Association chose to go to trial and although in trying the case it chose only to go against the County Respondents, by choosing this cause of action it has waived any right to ask this Court for a remedy as to Respondent Fugate.

II

The Alleged Conflict Among The Courts Of Appeal Created By This Decision Is More Apparent Than Real

Petitioner recites that the decision appealed is in conflict with decisions of other courts of appeal, namely the third, sixth and tenth circuits.

Respondent Fugate submits, however, that the jarring conflict necessary to trigger this Court's intervention is not present. The cases cited in the third and tenth circuits represented to be an "all fours" with the instant case, and decided in favor of jurisdiction, are not similar when factually examined.

Here, the settlement agreement was not filed in open court; the orders do not recite that a settlement agreement had been entered into; nor was any settlement agreement approved or incorporated into the dismissal order. *See* Petitioners' Petition, Appendix A, p. 5a; *Fairfax Countywide Citizens Association, et al.* v. *County of Fairfax, Virginia, et al.*, 571 F.2d 1299, 1301 (4th Cir. 1978).

Further, it was nearly three years after entering into the settlement agreement, and after the dismissal orders had been entered, that the County Respondents concluded that they did not have the requisite statutory power authorizing them to carry out the entire settlement agreement. *See* Petitioners' Petition, p. 3; Petitioners' Petition, Appendix A p. 5a; 571 F.2d at 1301. Until then, the County Respondents had proceeded to implement their settlement agreement.

In *Kelly* v. *Greer,* 334 F.2d 434 (3d Cir. 1964) and *Kelly* v. *Greer,* 365 F.2d 669 (3d Cir. 1966), *cert. denied,* 385 U.S. 1035 (1967), two of third circuit cases relied upon by the Association, the district court had postponed trial on a day-to-day basis to facilitate settlement. In fact, the district judge had remained in his chambers until 10:00 p.m. on January 22, 1963. Then, in the presence of the court, counsel for the parties read into the record the settlement agreement reached. The agreement called for the pending suits to be dismissed with prejudice. The District Court dismissed the litigation that very evening. When one of the parties failed to live up to the settlement, relief was sought. The third circuit in the first *Kelly* v. *Greer,* ruled, as did the

fourth circuit here, that Fed. R. Civ. P. 60(b) authorized the vacation of the dismissal order. In the second *Kelly* v. *Greer,* 365 F.2d at 671, the third circuit approved the district court's enforcement of the settlement agreement because it found that the "settlement agreements were entered into with its approval."

In *Skyline Sash Co.* v. *Fidelity and Casualty Co. of New York,* 379 F.2d 369 (3d Cir. 1967) *aff'g* 267 F.Supp. 577 (W.D. Pa. 1966) the settlement agreement had been concluded in the chambers of the district judge. The settlement was in the reporter's transcript.

In *Chief Freight Lines Co.* v. *Local Union No. 886,* 514 F.2d 572 (10th Cir. 1975), a tenth circuit decision relied on by the Association to show conflict, the issue was simply whether the district court had the power to reopen a case dismissed without prejudice under Fed. R. Civ. P. 60(b). There was no mention of enforcing the settlement stipulation. Further, this was a labor case for which separate federal jurisdiction exists under 28 U.S.C. § 1331 *et seq.* and Title 29 of the U.S. Code.

In the third circuit cases, the settlements had been, in effect, presided over by the district courts. The tenth circuit case never went into the enforcement of the settlement stipulation *per se*. Hence the spector of conflict between the fourth circuit and the third and tenth circuits is but a mirage.

As to the six circuit decisions, the fourth circuit acknowledged that the sixth circuit decision in *Aro Corp.* v. *Allied Witan Co.,* 531 F.2d 1368 (6th Cir. 1976), *cert. denied,* 429 U.S. 862 (1976) arose on facts virtually indistinguishable from the instant case. 571 F.2d at 1302; Petitioners' Petition, Appendix A, p. 7a. The court of appeals noted, however, that in *Aro, supra,* the sixth circuit, in effect, had relied upon the decision of a court of general jurisdiction, a

Pennsylvania state court to reach its finding that the district courts had "inherent power to enforce agreements entered into in settlement of litigation pending before them, 531 F.2d at 1371." 571 F.2d at 1304. Further, the egregious nature of the settlement repudiation in *Aro, supra,* undoubtedly led the sixth circuit to exercise jurisdiction and enforce the settlement agreement. Id. and 531 F.2d at 1370. It is that factual distinction from the instant case that renders any conflict between the sixth circuit and the fourth circuit more apparent than real. In essence the conflict, if one exists, arises from the application of different facts by two distinct courts to the principle of integrity of the court itself which leads to different results. In context both are correct.

Petitioners also cite the decision complained of as being in conflict with *Coburn* v. *Cedar Valley Land Co.,* 138 U.S. 196, 221-223 (1891). A review of that case reveals that Cedar Valley Land Company was an English corporation, hence diversity jurisdiction was present.

Petitioners list a number of cases in footnote 8, p. 11 Petitioners' Petition and argue that the fourth circuit's decision fails to distinguish accurately those cases. It is submitted that these cases can all be distinguished.

In *Autera* v. *Robinson,* 419 F.2d 1197 (D.C. Cir. 1969), no dismissal order had ever been entered ending the litigation. In fact, the question before the court of appeals concerned the nature of the hearing required to enforce an oral settlement agreement. In *Cia Anon Venezolana De Navegacion* v. *Harris,* 374 F.2d 33 (5th Cir. 1967), no final dismissal order had been entered either. The same facual setting existed in *All States Investors, Inc.* v. *Bankers Bond Co.,* 343 F.2d 618 (6th Cir. 1965), *cert. denied,* 383 U.S. 830 (1965) and *Kukla* v. *National Distillers Products Co.* 483 F.2d 619 (6th Cir. 1973).

Independent federal jurisdiction existed for the court's actions in *Cummins Diesel Michigan, Inc.* v. *The Falcon,* 305 F.2d 721 (7th Cir. 1962) (Admiralty); diversity jurisdiction existed in *Meetings and Expositions, Inc.* v. *Tandy,* 490 F.2d 714 (2d Cir. 1974) and *Massachusetts Casualty Ins. Co.* v. *Forman,* 469 F.2d 259 (5th Cir. 1977) and apparently in *Ingalls Iron Works Co.* v. *Ingalls,* 177 F.Supp. 151 (N.D. Ala. 1959) and *Beirne* v. *Fitch Sanitarium* 167 F.Supp. 652 (S.D. N.Y. 1958). In *Beirne* no final dismissal order has been entered nor does it appear that one had been entered in *Ingalls* either.

Thus the court of appeals for the fourth circuit quite properly distinguished them from the facts extant in this case.

III

The Decision Of The Court Of Appeals For The Fourth Circuit Did Not Deviate From The Normal So As To Warrant The Exercise Of This Court's Power Of Supervision

The court of appeals for the fourth circuit has not "so far departed from the accepted and usual course of proceedings." R. Sup. Ct. 19 (1) (b). The decision is consistent with other circuits' decisions finding that Fed. R. Civ. P. 60(b) was an appropriate vehicle to put the litigants to the *status quo ante.* The decision rested on the theory that district courts are courts of limited jurisdiction and no jurisdiction exists in a particular case until it can be established that jurisdiction over the subject matter exists. *Turner* v. *President, Directors and Company of the Bank of North America,* 4 Dall. 8 (1799).

The court of appeals holding or opinion has not struck out on new uncharted ground nor does it reflect an unwillingness to acknowledge either this Court's rulings or enactments of Congress. The decision is well reasoned and in consonance with other precedents.

IV

The Issue On The Merits Is Moot

On the merits of the dispute, the County Respondents relied heavily on the proposition that state law prevented them from upgrading and maintaining roads which cannot be accepted into the secondary system of State highways.

In 1978 the General Assembly changed a 46 year statutory scheme which prevented counties from expending county revenues to maintain roads. At the same time the statutory scheme of discouraging the establishment of roads not in the secondary system of State highways was altered.

The enactment of § 33.1-225.3, Code of Virginia (1950), as amended, (Appendix B to this Brief in Opposition) allows Fairfax County to expend funds on minor improvements and maintenance on roads not in the secondary system of State highways provided the roads are open for the public use. Ch. 43 [1978] Va. Acts of Assembly 76. The enactment of § 15.1-26.2 of the Code (Appendix C to this Brief in Opposition) allows all counties to expend general revenues for the construction and repair work on public roads not in the State highway system or the secondary system. Ch. 163 [1978] Va. Acts of Assembly 273.

In short, the statutory reasons for the County Respondents not being able to comply with the settlement agreement no longer exist. In all likelihood the Association's attempt to enforce the settlement agreement and the County Respondents' reluctance to perform is moot. There are, however, other reasons for the County Respondents' reluctance to perform, like mutual mistake of fact, not connected with the statutory reasons that may provide a continuing controversy. But such continuing controversy has already been submitted by the Association to the district court. A reversal of the court of appeals would accomplish nothing that is

not already occurring. Consequently, the request of the Association is moot.

CONCLUSION

Respondent Fugate is no longer a party litigant. But assuming that he is still a party litigant, the decision of the court of appeals is not in actual conflict with another court of appeals on the same facts nor is the decision of the court of appeals "so far departed from the accepted and usual course of proceedings." In fact, the decision is eminently correct and proper. Further, it appears that the statutory rationale of the County Respondents for not performing the settlement agreement for which specific performance is sought no longer exists by virtue of enactments of the 1978 General Assembly of Virginia and the issues on the merits are moot. Accordingly, a Writ of Certiorari should not be granted.

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November 20, 1978

APPENDIX

APPENDIX A

In The
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Fairfax Countywide Citizens Association, et al.,	)	
Plaintiffs,	)	
v.	)	Civil
	)	Action No.
County of Fairfax, Virginia, et al.,	)	71-336-A
Defendants.	)	

ORDER

Pursuant to and for the reasons stated in the Court's memorandum opinion of September 27, 1976, attached hereto and made a part hereof,

The June 1, 1972 order of dismissal, heretofore entered herein, is hereby vacated and set aside and the above styled suit is hereby reinstated as to the defendants County of Fairfax, Virginia, William S. Hoofnagle, individually and as Chairman, Board of Supervisors, Fairfax County, Virginia, and Herbert F. Harris, II, Joseph Alexander, John Herrity, Alan H. Magazine, Audrey Moore, Martha Pennino, Rufus Phillips and James Scott, individually and as members of the Board of Supervisors, Fairfax County, Virginia, and/or their successors in office.

And the Board of Supervisors of Fairfax County, Virginia, is hereby directed and ordered to complete the performance of its part of the May 31, 1972 settlement agreement, as

modified by the written stipulation of the parties, which is attached hereto and made a part hereof, within the time herein set forth.

The upgrading of the remaining P.6 streets shall commence as and when the weather permits and be concluded on or before two years from the date of this order.

This order shall not be construed as prohibiting the parties by mutual agreement from dropping any of the remaining named P.6 streets from this law suit, or the County of Fairfax from acquiring the necessary rights-of-way if deemed needed for the herein required upgrading and maintenance, as the law provides for.

This case will remain on the docket of this Court for the entry of such further orders as may be necessary to assure compliance with this order and for the awarding of such reasonable counsel fees and costs as are deemed proper.

The Clerk will send a copy of this order to all counsel of record.

/s/ OREN R. LEWIS
United States Senior Judge

November 26, 1976

LIST OF P.6 ROADS REQUESTED BY THE COURT

Derek Road
Kingland Road
Unnamed Road #3
Unnamed Road #4
Stokes Lane
Unnamed Road #7
Cheryl Place
Courtland Drive
Dewey Jones Street
Hoffman's Lane
Poplar Lane
Sheppards Court
Williams Lane
Pine Lane (old segment)
Eighth Street
(two segments)
Clearview Drive
Costner Street
Random Road
Sampson Street
Scipio Lane
Tinners Hill Road
Bannerwood Drive
Porter Street
Amanda Place
Haney Lane
Marlewood Drive
Suncrest Lane
Marywood Road
Cottonwood Street
Unnamed Road #9
Rachel Road
Unnamed Road #5
Hope Park Road
First Road
Darkwood Drive
Old Mill Road
Dade Lane
Unnamed Road #10
Ashburton Avenue
Unnamed Road #2
Rynex Drive
White Pine Drive
Unnamed Road #1

APPENDIX B

ACTS OF ASSEMBLY

CHAPTER 43

An Act to amend the Code of Virginia by adding a section numbered 33.1-225.3, relating to funds for certain roads.

[S 253]

Approved March 9, 1978

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 33.1-225.3 as follows:

§ 33.1-225.3. Funds for roads not in the secondary system. — Notwithstanding the provisions of §§ 33.1-225 or 33.1-230, the governing body of any county under the urban county executive form of government may expend funds on minor improvements and maintenance of roads not within the secondary highway system, provided such roads are open for public use. A road shall be determined to be open for public use by applying the same standards set forth in § 33.1-184 or by final order of a court of competent jurisdiction on or before January one, nineteen hundred seventy-eight, except that in order to be eligible for funds under this section such roads need not be thirty feet in width but shall not be less than fifteen feet wide. The maximum amount of mileage to be maintained under this section shall not exceed thirty miles.

APPENDIX C

ACTS OF ASSEMBLY

CHAPTER 163

An Act to amend the Code of Virginia by adding a section numbered 15.1-26.2, relating to the use of county revenues for highway maintenance or construction.

[S 441]

Approved March 23, 1978

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 15.1-26.2 as follows:

§ 15.1-26.2. County revenues for highways.—Any county may expend so much of its general revenues as its governing body by unanimous vote of its members shall deem appropriate for the construction and repair work on public roads not in the State highway system or the secondary system and shall have authority to own and operate the properties and equipment necessary to carry out the provisions of this section.

Any county revenues expended for roads not a part of the highway system or secondary system shall not be considered to be highway funds which are made available for highway purposes pursuant to § 33.1-23.1 and shall not diminish funds paid to counties under § 33.1-23.1.